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BEFORE THE

## Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Reallocation and Service Rules for  
the 698-746 MHz Spectrum Band  
(Television Channels 52-59)GN Docket No. 01-74

To: The Commission

**PETITION FOR RECONSIDERATION**

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## **SUMMARY**

Univision Television Group, Inc. (“Univision”), the winning bidder in the Commission’s July 2000 auction for an NTSC authorization for Channel 52 at Blanco, Texas, hereby seeks reconsideration of the Commission’s action in the above-referenced Report and Order (the “Order”). Despite Univision’s selection as the winning bidder in FCC Auction No. 80, its commitment to pay nearly \$19 million dollars for the Blanco authorization, its required July 2000 downpayment to the Commission of nearly \$4 million dollars, and the year and a half that its long-form application has now languished at the Commission, the Order, without comment, fails to exclude Univision from the category of applicants who must now amend their applications to specify an in-core channel or DTV operation, or face dismissal.

Compounding the harm that would be caused by the Order if left unmodified is the fact that the Commission has recognized on several occasions the extraordinary circumstances surrounding the Blanco allocation and Blanco’s overriding need for a first local broadcast service. Particularly in light of the Commission’s previous efforts to preserve the Blanco allocation in the face of competing spectrum demands, the Order’s “one size fits all” treatment of Univision’s pending application, as well as its disregard for Blanco’s recognized need for service, is inequitable, contrary to the public interest and congressional intent, a violation of the Administrative Procedure Act, a breach of contract, a violation of the Fifth Amendment Takings Clause of the U.S. Constitution, and poor public policy, as it will cause a reduction in participation in, and the amounts bid in, future spectrum auctions.

In an effort to comply with the requirements of the Order, Univision has worked tirelessly to locate an alternate channel that would permit commencement of service to Blanco while supporting the Order’s goal of clearing the channels 52 to 59 spectrum for future services.

Univision believes that it has located a single in-core channel meeting all of the Commission's allotment requirements, and is submitting a petition for rulemaking seeking to substitute that channel for Channel 52 at Blanco. However, because Commission allocation rulemakings and the grant of associated applications have historically been long and unpredictable affairs, Univision is herein seeking reconsideration of the Order to preserve its Channel 52 rights should the Commission reject or delay consideration of Univision's in-core rulemaking petition and any associated amendment to the Blanco application.

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To: The Commission

**PETITION FOR RECONSIDERATION**

Univision Television Group, Inc. ("Univision"), by its counsel and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby petitions the Commission for reconsideration of its Report and Order (the "Order") in the above-referenced proceeding.<sup>1</sup> In particular, Univision seeks reconsideration of the Commission's action adversely impacting Univision's application as the winning bidder for the construction permit for a new analog television station on Channel 52 at Blanco, Texas. The Commission erred by failing to exclude Univision's post-auction application at Blanco from those applications required under the Order to be amended or dismissed in the face of the reallocation of the channels 52-59 spectrum for use by new licensees and new services. The Commission's actions uniquely injure Univision, which committed in July 2000 to pay a total of \$18,798,000.00 for the Blanco NTSC authorization, and which deposited its required downpayment of \$3,759,600.00 with the Commission over a year

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<sup>1</sup> In the Matter of Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), Report and Order, GN Docket No. 01-74, FCC 01-364, released January 18, 2002.

and a half ago. If allowed to stand, the Order would effectively take back an auctioned authorization for NTSC Channel 52 at Blanco that the Commission has previously declared is a much needed initial broadcast service, and reauction that spectrum to new bidders in the upcoming Lower 700 MHz auction. As detailed below, the Commission's action is inequitable, contrary to the public interest and congressional intent, a violation of the Administrative Procedure Act, a breach of contract, a violation of the Fifth Amendment Takings Clause of the U.S. Constitution, and will cause a reduction in both participation and the amounts bid in future spectrum auctions.

## INTRODUCTION

The Order establishes service and licensing rules for the future use of the Lower 700 MHz spectrum (698-746 MHz). In an effort to clear the way for future competing uses, the Order announces that the Commission will not authorize any additional analog television stations on Channels 52-59.<sup>2</sup> Accordingly, the Order dismisses any pending petitions for rulemaking seeking to allocate a new NTSC channel in the Lower 700 MHz spectrum and instructs those applicants with pending applications for initial construction permits for new NTSC stations in that spectrum to amend their applications to specify either digital operations or operation on an in-core channel (Channels 2-51).<sup>3</sup> Any pending applicant that fails to amend its application or file a petition for rulemaking to allocate an in-core channel by the March 8, 2002 deadline established by the Order will be dismissed.<sup>4</sup>

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<sup>2</sup> Order at ¶¶ 44-45.

<sup>3</sup> Id. at ¶ 44.

<sup>4</sup> Id. at ¶ 45.

Although Univision has an application pending for an initial NTSC construction permit on Channel 52 at Blanco, Texas, and is therefore technically subject to the Order, Univision is uniquely situated from all other applicants subject to the Order. No other applicant affected by the Order has: (1) participated in an auction to obtain a license where it was selected as the winning bidder; (2) committed to pay nearly \$19 million dollars for the authorization; (3) submitted nearly \$4 million dollars as a downpayment to secure its position as the winning bidder for the authorization; and (4) had a grantable application pending before the Commission long before the release of the Order.<sup>5</sup> As such, Univision is truly uniquely situated and would now be an incumbent broadcaster exempt from the reach of the Order but for Commission delay in processing its application.

While Univision strongly believes that the Order's overly broad inclusion of the Blanco application as being among those required to "amend or die" cannot withstand scrutiny, it is well aware of the Commission's desire to minimize obstacles to the planned auction of the channels 52-59 spectrum. Upon release of the Order, Univision conducted an exhaustive channel search from numerous reference points surrounding Blanco and found that, with one exception, there were no core channels available that did not require multiple and extensive waivers to implement. The one channel that did not face multiple obstacles, Channel 17, was blocked by the existence of a nearby Class A station already operating on Channel 17. Fortunately, in an act of providence, Univision had recently acquired the Channel 17 Class A station. As a result, modification of Univision's Class A station will permit substitution of in-core Channel 17 for

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<sup>5</sup> In fact, Univision amended the Blanco application on September 4, 2001 to modify its tower site to eliminate the need for any rule waivers in an effort to expedite grant of the application.



Channel 52 at Blanco, and Univision is therefore filing a Petition for Rulemaking, consistent with the Commission's Public Notice,<sup>6</sup> to substitute Channel 17 for Channel 52 at Blanco in an effort to assist the Commission in clearing the channels 52-59 spectrum while providing long-promised broadcast service to the public.

However, because Commission allocation rulemakings and the grant of associated applications have historically been long and unpredictable affairs, Univision is herein seeking reconsideration of the Order to preserve its Channel 52 rights should the Commission reject or delay consideration of Univision's in-core Channel 17 rulemaking petition and any subsequent amendment to the Blanco application. Specifically, Univision seeks to be excluded from the category of applicants for whom amendment of applications is mandatory, and, in the event that the Commission should decline to allocate Channel 17 or to subsequently grant an amended NTSC application specifying Channel 17, retain its rights to provide NTSC service on Channel 52 consistent with the rights of a winning bidder in FCC Auction No. 80.

**I. The Order's Elimination of the Previously-Auctioned Authorization for NTSC Service on Channel 52 at Blanco Is Contrary to the Public Interest**

**A. The Community of Blanco, Texas Has Waited Nearly Two Decades for a First Broadcast Service**

In 1985, three parties applied for a new television broadcast station on UHF Channel 52 at Blanco, Texas. Consistent with Commission procedures at the time, a comparative hearing was held to award the initial construction permit to the best qualified applicant. Following the disqualification of two of the three applicants, the construction permit was ultimately awarded to

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<sup>6</sup> Mass Media Bureau Announces Window Filing Opportunity for Certain Pending Requests for New NTSC Television Stations on Channels 52-59, Public Notice, DA 02-270 (released February 6, 2002).

the sole remaining party. The successful applicant, however, was subsequently dismissed for failure to respond to a Commission inquiry, leaving no qualified applicants for the Blanco permit.<sup>7</sup> While the unsuccessful applicants pursued various administrative and judicial remedies,<sup>8</sup> Congress enacted the Balanced Budget Act of 1997, authorizing the Commission to use competitive bidding procedures to resolve pending comparative proceedings.<sup>9</sup>

Armed with new competitive bidding procedures, in 1999 the Commission slated the authorization for a new NTSC station on Channel 52 at Blanco for auction. On December 17, 1999, the Commission released a Public Notice opening a five-day filing window for interested parties to submit a short-form application.<sup>10</sup> Designated as FCC Auction No. 80, the Commission established rules governing the auction and set minimum opening bid amounts.<sup>11</sup> Subsequently, Univision and ten other applicants ultimately qualified for, and participated in, the auction for a new NSTC authorization on Channel 52 at Blanco. As required by the Commission's auction rules, each qualified bidder submitted an acceptable short-form application and deposited an upfront payment of \$420,000.00 with the Commission. Auction No. 80 was conducted over three days in mid-July and lasted 16 rounds. The Auction concluded with Univision submitting the winning high bid of \$18,798,000.00.

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<sup>7</sup> See Dorothy O. Schulze and Deborah Brigham, 13 FCC Rcd 3259 (1998), *affirmed*, SL Communications, Inc. v. FCC, 168 F.3d 1354 (D.C. Cir. 1999).

<sup>8</sup> See, e.g., Dorothy O. Schulze and Deborah Brigham, 13 FCC Rcd 3259 (1998), *affirmed*, SL Communications, Inc. v. FCC, 168 F.3d 1354 (D.C. Cir. 1999).

<sup>9</sup> See P.L. No. 105-33, 111 Stat 251 (1997).

<sup>10</sup> Auction Filing Window for New Television Station Channel 52 at Blanco, Texas, Public Notice, DA 99-2824 (released Dec. 17, 1999), as extended by, Blanco, Texas Filing Window Extended to February 1, 2000, Public Notice, DA 00-135 (released Jan. 27, 2000).

<sup>11</sup> Auction of Construction Permit for New Television Station Channel 52 at Blanco, Texas Scheduled for July 11, 2000, Public Notice, DA 00-1069 (released May 12, 2000).

On July 18, 2000, the Commission released a Public Notice giving official notification that Univision was the winning bidder for the Blanco construction permit.<sup>12</sup> By that Public Notice, the Commission gave Univision ten business days to submit a downpayment in the amount of 20% of its winning bid, and thirty days to submit a complete long-form application. On July 31, 2000, Univision submitted an additional \$3,339,600.00 to the Commission, thereby increasing the amount on deposit with the government from \$420,000.00 to a total of \$3,759,600.00. Subsequently, on August 17, 2000, Univision submitted its long-form application on FCC Form 301. A competing auction participant filed a petition to deny Univision's application on September 5, 2000, opposing requested transmitter site waivers and questioning the adequacy of information in Univision's original short-form application.

Over one year after Univision filed its long-form application, the Commission issued an August 20, 2001 letter requesting that Univision amend its application to clarify and respond to a number of issues. In response to that letter, and given the inordinate delay in processing the application, Univision amended its application on September 4, 2001 to change its transmitter site, thereby resolving the issues raised in the Commission's letter and eliminating the need for any waivers requested in the original application. Despite Univision's prompt response to the Commission's letter, and despite the fact that Univision spent a great deal of time and money re-engineering its proposal to obviate the Commission's concerns, the Commission failed to process Univision's application to grant. Instead, the application continued to sit at the Commission until the release of the Order more than four months later, which effectively negated the authorization

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<sup>12</sup> Blanco, Texas Broadcast Auction No. 80 Closes, Public Notice, DA 00-1592 (released July 18, 2000).

won at auction by Univision. To date, Univision's long-form application has been pending at the Commission for over 18 months since winning Auction No. 80.

**B. The Commission Has Repeatedly Held That Initiation of Analog Television Service to Blanco Is an Important Public Interest Objective**

While the delay in processing the Blanco application, and the Order's effort to pull the rug out from under Univision entirely, have certainly harmed Univision, these events have been particularly startling given that they have delayed, and now threaten to prevent, the initiation of broadcast service in Blanco despite repeated statements by the Commission stressing the importance of that goal. In adopting the DTV Table of Allotments, the Commission protected the Blanco NTSC allotment, along with other NTSC allotments for which applications were pending, from being eliminated to make room for new DTV allocations.<sup>13</sup> In doing so, the Commission stated "this will ensure that parties who have already begun to invest in new stations . . . may continue to pursue their ongoing station development projects."<sup>14</sup>

The Commission specifically affirmed this action with regard to the Blanco allocation in *Dorothy O. Schulze and Deborah Brigham*, in which it reviewed a settlement proposal submitted by one of the disqualified applicants from the original Blanco comparative hearing.<sup>15</sup> In that case, the disqualified applicant argued that since the Commission had proposed to delete all vacant allotments to make way for DTV, the Commission should grant the applicants' proposal

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<sup>13</sup> In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report and Order, 12 FCC Rcd 14588, 14639 (1998) ("Sixth DTV Report and Order").

<sup>14</sup> Sixth DTV Report and Order at 14639.

<sup>15</sup> Dorothy O. Schulze and Deborah Brigham, 13 FCC Rcd 3259 (1998), *affirmed*, SL Communications, Inc. v. FCC, 168 F.3d 1354 (D.C. Cir. 1999).

or the Channel 52 allotment would be deleted and service to Blanco would never be initiated. In rejecting the applicant's arguments, the Commission stated:

While we agree with Petitioners' premise that it would be equitable to take action to ensure that Blanco is not deprived of this long-awaited television service, we need not grant the relief Petitioners seek to achieve that result. . . . [I]n light of all the circumstances in this case, and to ensure that the people of Blanco have an opportunity to receive television service without undue delay, we believe that Channel 52 should be preserved. Although we found that eliminating vacant NTSC allotments would generally further our goals in the development of DTV allotments, we recognize the countervailing public interest in protecting the Channel 52 allotment in Blanco.<sup>16</sup>

The Commission then concluded that

both the public interest and basic fairness warrant taking further steps to provide service on Channel 52 in Blanco. We hold that Channel 52 in Blanco is exempt from the general provisions of the Sixth Report and Order deleting vacant NTSC allotments. We direct the Bureau, therefore, to take appropriate steps to permit the filing of applications for Channel 52.<sup>17</sup>

Pursuant to the Commission's directive, the Mass Media Bureau initiated the auction proceedings that ultimately resulted in Univision being selected as the winning bidder.

In protecting the Blanco NTSC Channel 52 allotment during the creation of the DTV Table of Allotments, and later specifically reaffirming Blanco's tremendous need for service in the face of alternate uses of the spectrum, the Commission held that the need for broadcast service in the Blanco area was far greater than the need to clear spectrum for a future use (i.e., DTV). The Commission once again recognized Blanco's need for service when, despite having marked channels 52 to 59 for auction for non-broadcast uses *over two years earlier*,<sup>18</sup> the

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<sup>16</sup> Dorothy O. Schulze and Deborah Brigham, 13 FCC Rcd at 3263 (emphasis added).

<sup>17</sup> Id. (emphasis added).

<sup>18</sup> Sixth DTV Report and Order at 14639.

Commission announced and proceeded to conduct the auction for the Blanco Channel 52 authorization in 2000.

The Order points to no change in circumstances since 2000 that has lessened the need for broadcast service in Blanco, or that would justify reversal of the Commission's decisions to protect and auction the Channel 52 NTSC authorization in the face of competing demand for the spectrum. In fact, the Commission made the decision to auction the Channel 52 authorization while already fully aware of its plans to auction the channels 52-59 spectrum, and Univision has justifiably relied on that decision. Ultimately, Univision's Blanco application is uniquely situated with regard to all other pending applications, and grant of the Channel 52 authorization at Blanco remains in the public interest.<sup>19</sup>

**C. Commission Delay Has Already Served to Deprive Local Viewers of Access to Spanish-Language Programming, and the Order, If Not Modified, Could Permanently Deprive Viewers of Such Programming**

Univision continues to be ready and able to provide Spanish-language broadcast programming to viewers in the Blanco area. Such service is sorely needed, as the Austin

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<sup>19</sup> As detailed in Section VII, *infra*, Nielsen data indicates that there are currently no DTV sets in Blanco. It is therefore a mystery as to how the Order can find that the public interest is best served by permitting use of the Channel 52 allocation only if it is used as a DTV facility, when residents of Blanco have no ability to receive digital transmissions. The Commission can only meet its obligation under Section 307(b) of the Communications Act of 1934 to "provide a fair, efficient, and equitable distribution of radio service" by allowing use of the Channel 52 allotment for NTSC broadcasting at Blanco until such time as local viewers obtain DTV sets and can be adequately served by DTV facilities. This is the same approach the Commission has adopted for all other television stations that lack a paired DTV channel and is eminently logical. See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, MM Docket No. 87-268, 13 FCC Rcd 6860 (1998) at ¶ 11; In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, Order on Reconsideration of the Third Report and Order, WT Docket No. 99-168, 24 Comm. Reg. (P&F) 727 (2001) at ¶ 9.

Designated Market Area, in which Blanco is located, currently has no full power Spanish-language television stations, despite having a large Hispanic population. Since winning the auction in July 2000, Univision has made extensive preparations for the introduction of service, and potential viewers are apparently eagerly awaiting the new broadcast service. According to a newspaper article published on May 11, 2001 in the *Austin American-Statesman*, “[c]entral Texas is getting its own Spanish-language television station, but how soon depends on how fast the Federal Communications Commission can cut through its own red tape.”<sup>20</sup> At that time, nearly a year ago, the newspaper reported that it could take “months” before the Commission issued a construction permit. Unfortunately, the Commission’s inaction has left local viewers without Spanish-language television service for much longer than that, and the Order now threatens to prevent initiation of such service entirely.

**II. The Order Effectively Overrules Without Comment, Analysis or Justification, Prior Commission Rulings as to the Overriding Need for Broadcast Service in Blanco, and Is Therefore Arbitrary and Capricious Under the Administrative Procedure Act**

The Commission’s actions are governed by the Administrative Procedure Act (“APA”), which states that an agency’s actions, findings or conclusions may be set aside by a court if they are found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>21</sup> If an agency, in this case the Commission, departs from its prior policies, it must have a rational basis for doing so and must explain its reasoning. The U.S. Supreme Court has held that “the agency must examine the relevant data and articulate a satisfactory explanation for its action

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<sup>20</sup> “Coming to Austin TV: Broadcasts in Spanish, Univision permit pending at FCC to build station in Blanco for Central Texas,” Austin American-Statesman, May 11, 2001, page D1.

<sup>21</sup> 5 U.S.C. § 706(2)(A).

including a ‘rational connection between the facts found and the choice made.’”<sup>22</sup> When the Commission seeks to change an existing rule, policy, or precedent, it must “supply a reasoned analysis indicating that prior policies are being *deliberately changed and not casually ignored*.”<sup>23</sup>

In the instant case, the Order does not even acknowledge that its immediate reallocation of television channels 52-59 unnecessarily reverses the Commission’s long-standing determination that initiation of television service to Blanco, Texas is of paramount importance to the public interest. Similarly, the Order ignores the substantial amount of time, money, and effort Univision has dedicated to the initiation of television service in Blanco in reliance on the authenticity of the Commission’s auction procedures. Those participating in the Commission’s auctions are certainly entitled to rely on the validity of those proceedings, and as the U.S. Supreme Court has stated, “settled expectations should not be lightly disrupted.”<sup>24</sup> The Commission’s actions in the Order are manifestly arbitrary and capricious and therefore violate the APA.

While the Order, if it had addressed the issue at all, would apparently regard the Commission’s deliberate choice to conduct an auction for NTSC Channel 52 at Blanco, after having already set aside the channels 52-59 spectrum for a future non-broadcast auction, as an accidental aberration, that is clearly not the case. Through a lengthy and complex process, the

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<sup>22</sup> Motor Vehicle Mfrs Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (quoting Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962)); see also MCI Telecomm. Corp. v. FCC, 10 F.3d 842, 846 (D.C. Cir. 1993).

<sup>23</sup> Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971) (emphasis added); see also Telephone & Data Systems, Inc. v. FCC, 19 F.3d 42, 49 (D.C. Cir. 1994) (stating that the Commission may change its prior decisions “by advancing a reasoned explanation for the change, but it may not blithely cast them aside”) (citations omitted).

<sup>24</sup> Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).



Commission notified potential participants, established auction rules, set minimum bids, created specialized auction software, reviewed and approved potential bidders, rejected potential bidders who failed to meet the Commission's requirements for participation in the auction, accepted millions of dollars in up-front payments, held an auction, determined the winning bidder, and demanded and received a 20% downpayment from the winning bidder.

Despite this substantial investment of time, money, and effort by the Commission, Univision, and other auction participants, the Commission has now, in a single stroke, sought to potentially negate all of those efforts and the public interest benefits intended to flow from them. Even ignoring the lengthy comparative hearing and resulting litigation that plagued the Blanco allocation in the 1980s and 1990s, the efforts by the Commission and others to bring service to Blanco through the auction process certainly merit completion of that process now. To discard those efforts and the numerous public interest findings underlying them without comment or justification is not merely arbitrary and capricious, but an abandonment of the Commission's public interest mandate.

### **III. The Threat to Broadcast Service in Blanco Created by the Order Results From the Commission's Own Delay in Processing the Blanco Application – A Delay That Conflicts With the Congressional Intent Behind Granting Auction Authority to the Commission**

When Congress gave the Commission the authority to conduct auctions for broadcast authorizations, that power was accompanied by a congressional mandate that the Commission utilize its new authority to expedite the initiation of new service to the public. Section 309(j) of the Communications Act of 1934, as amended, states that in implementing competitive bidding procedures, the Commission

shall seek to promote the purposes specified in Section 1 of this Act and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays.<sup>25</sup>

The Commission explicitly acknowledged this mandate in its First Report and Order adopting competitive bidding procedures for the award of broadcast licenses, stating that:

we . . . consider expedition of service to the public to be of paramount significance. Delay in awarding a construction permit frustrates the public interest and denies communities new or expanded broadcast service.<sup>26</sup>

Further recognizing the importance of expediting the availability of new broadcast service, Congress provided for a shortened petition to deny period in the Balanced Budget Act of 1997. As codified in Sections 1.2108(b) and 73.5006 of the Commission's Rules, auction petitioners have only ten days in which to file a petition to deny after the Commission's release of a public notice announcing the acceptance of a complete long-form application.<sup>27</sup> Similarly, oppositions and replies to any petitions must be submitted within five days, respectively.<sup>28</sup> Despite this emphasis on speeding broadcast service to the public, residents of Blanco continue to await the arrival of broadcast service nineteen months after the auction, and seventeen years after the original applications for the Blanco allotment were filed. Now, because of the Order,

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<sup>25</sup> 47 U.S.C. § 309(j)(3) (emphasis added). In authorizing the Commission to use competitive bidding procedures to award broadcast licenses, Congress found that "[a]uctions are administratively efficient. They expedite licensing and this ensures that new or additional services are rapidly deployed." H.R. Conf. Rep. No. 105-149, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 558 (1997).

<sup>26</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings; Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, First Report and Order, MM Docket No. 97-234, 13 FCC Rcd 15920 (1998) at ¶165 (emphasis added).

<sup>27</sup> 47 C.F.R. §§ 1.2108(b) and 73.5006.

<sup>28</sup> 47 C.F.R. § 1.2106(c).

residents of Blanco are threatened with the ultimate delay in service – forever. If Univision is not permitted a viable option on Channel 17, Channel 52 must be retained for analog operation at Blanco.

#### **IV. Implementation of the Blanco Allocation Would Serve the Public Interest While Not Hindering the Proposed Reallocation of Spectrum**

Although the Order does not address the adverse impact upon Blanco should the Blanco allocation be eliminated, one Commissioner did acknowledge the public interest benefits being lost by the Commission's action. In a separate statement to the Order, Commissioner Martin noted that granting pending applications for construction permits to broadcast in analog on channels 52-59

would have resulted in substantial consumer benefits with little-to-no harm to the digital transition or the ability to auction the spectrum at issue. Indeed, in an era of increasing consolidation of the broadcasting industry, the majority has missed an opportunity to promote local origination, and has effectively denied numerous communities the chance to receive local broadcast services for the first time....

As a practical matter and on policy grounds, it seems that the more sensible approach would have been to allow analog broadcast today. Spectrum that has been lying fallow would be put to productive use more quickly. Consumers would benefit by having more viewing options. Indeed, nine communities would have had their own local channel for the first time.<sup>29</sup>

Adding further weight to Commissioner Martin's statement is the fact that Univision's Blanco application is uniquely situated, having resulted from a specific Commission decision to ensure analog service in Blanco over other spectrum uses, and having been part of a long-past auction where Univision was selected as the winning bidder and was required to submit a \$3,759,600.00 downpayment to the Commission, and to continuously have the remainder of its

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<sup>29</sup> Separate Statement of Commissioner Kevin J. Martin, Approving in Part, Concurring in Part.

\$18,798,000.00 winning bid available in cash for submission to the Commission on ten days' notice that the Commission is ready to grant the application. The opportunity cost of being unable to utilize these cash reserves elsewhere for over nineteen months and counting is significant. More concretely, even at a moderate 8% interest rate, Univision has lost over \$500,000.00 in interest on the \$3,759,600.00 downpayment that it paid the Commission in July 2000. Under these circumstances, Blanco has certainly earned the right to its first broadcast service and Univision has certainly earned the right to provide it.

Moreover, there are currently about 100 full power analog television stations and 165 DTV stations authorized to operate in the channels 52-59 band, at least 24 of which are on Channel 52. It is difficult to argue that operation of a single Channel 52 analog facility at Blanco, Texas will significantly impact the Commission's ability to auction the 52-59 band, or affect the price paid by bidders for that spectrum. Even to the extent that it might, Univision's judicial appeals of any elimination of the Blanco allocation would inevitably have a similar effect, and that effect would be dwarfed by the impact on future bidders caused by a Commission decision here that bidders cannot rely upon the Commission to stand by the results of its auctions. The notion that a winning bidder may submit its downpayment and wait years before being told by the Commission that no authorization is actually available would certainly have a sobering effect on potential bidders in any future auction.

**V. The Order Threatens to Undermine the Reliability of Spectrum Auctions, Thereby Discouraging Participation and Reducing the Amount Applicants Are Willing to Bid in Future Auctions**

If left unmodified, the Order will undermine the reliability and efficacy of all future Commission spectrum auctions. Unless the Commission rectifies the instant situation by granting Univision's pending application as amended, no participant in a future FCC auction will

ever be confident that they will actually receive the authorization for which they are bidding. Not only is the Commission's lengthy delay in granting Univision's construction permit contrary to Congressional intent and its own regulations, but that delay, in combination with the Order, threatens to fundamentally change or eliminate the authorization on which the participants in Auction No. 80 bid. Participants in future FCC auctions will seek to offset the risk that the Commission may fail to grant their authorization within a reasonable time, and the risk that, during the period from the auction to the grant of the license, the Commission may fundamentally change its licensing rules and potentially render the authorization valueless.

Indeed, bidders in the upcoming auctions for the Upper and Lower 700 MHz spectrum will be wary of bidding billions of dollars when faced with the prospect that the Commission could wait two years before granting the licenses and then change the operative parameters of those authorizations. If future auction participants are unable to rely on the Commission's auctions and be assured that they will actually receive the licenses for which they bid, it will frustrate applicants' business planning and further undermine the Commission's auction proceedings.

**VI. Should the Commission Fail to Grant Univision's Pending Application as Amended, the Commission Will Be in Breach of Contract**

As a practical matter, courts have repeatedly held that a legally binding contract is created when the government conducts an auction and a private party accepts the government's offer.<sup>30</sup> As discussed below, the courts have uniformly found that "advertisement, bid and acceptance" create a legally-binding contract between the government and a private party in an

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<sup>30</sup> See, e.g., United States v. Purcell Envelope Co., 249 U.S. 313 (1919); Garfield v. United States, 93 U.S. 242 (1876); Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d

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auction proceeding. By holding an auction and selling the rights to a construction permit for NTSC Channel 52 at Blanco to the highest bidder, the Commission entered into an implied-in-fact contract, which it has now broken by effectively withdrawing the promised authorization.

A valid contract with the United States “requires that the following criteria have been met: ‘a mutual intent to contract including offer, acceptance, and consideration; and authority on the part of the government representative who entered or ratified the agreement to bind the United States in contract.’”<sup>31</sup> An agreement is implied in fact when it is “founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”<sup>32</sup> Thus, when the Commission, under its lawfully delegated authority, conducted the auction of a broadcast license for a new analog television station on Channel 52 at Blanco, it offered that specific authorization for sale to interested and qualified parties.

Similarly, when Univision submitted bids, was found to be the winning bidder, legally committed to paying nearly \$19 million dollars for that authorization, and submitted the required downpayment as consideration,<sup>33</sup> it accepted the Commission’s offer and entered into a binding

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642 (2<sup>nd</sup> Cir. 1945); United States v. Conti, 119 F.2d 652 (1<sup>st</sup> Cir. 1941); and North American Iron & Steel Co. v. United States, 130 F. Supp. 723 (E.D. N.Y. 1955).

<sup>31</sup> Bailey v. United States, 40 Fed. Cl. 449, 458 (1998) (quoting Total Medical Management, Inc. v. United States, 104 F.3d 1314, 1319 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 857 (1997) (*citing* Thermalon Indus., Ltd. v. United States, 34 Fed. Cl. 411, 414 (1995) (*citing* City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991)))).

<sup>32</sup> Baltimore & Ohio R.R. Co. v. United States, 261 U.S. 592, 597 (1923).

<sup>33</sup> In addition, Univision has detrimentally relied on the Commission’s commitment to deliver the promised authorization. Univision has incurred substantial expenses in engineering and legal fees in prosecuting its application, and has forgone alternate opportunities in reliance on the Commission’s selection of Univision as the winning

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contract with the Commission. In fact, if Univision had unilaterally sought to withdraw from or modify its bid under that contract in the same manner that the Commission is now attempting, the Commission's auction rules and policies would subject Univision to substantial financial penalties. The Commission cannot have it both ways – just as Univision has been required to live up to its part of the contract, the Commission must now do the same.

The Commission, as the government agency tasked with spectrum management, has the sole authority to auction and grant this authorization and thus was authorized to bind the United States government to the contract. Further supporting the existence of such a contract is the fact that it is even easier to create a legally-binding contract in situations involving a government auction. It is a well-settled principle of contract law that an enforceable contract is created at the time the parties reach a final agreement through offer and acceptance.<sup>34</sup> The actual execution and approval of a formal document is not essential to the consummation of an enforceable contract.<sup>35</sup> In *United States v. Purcell Envelope Co.*, the United States Postal Service invited by

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bidder in Auction No. 80. Thus, Univision's detrimental reliance also constitutes consideration under contract law.

<sup>34</sup> United States v. Purcell Envelope Co., 249 U.S. at 319 (finding that in a government auction proceeding, a formal contract is created upon the acceptance of the bid and the entry of the order awarding to the successful bidder); *see also* Sylvan Crest Sand & Gravel Co., 150 F.2d at 643 (holding that the parties "intended a contract to result from the [submission] of the bid and the government's acceptance [of the bid]"); United States v. Conti, 119 F.2d at 655 (finding that the government's acceptance of a bid creates a contract); Tennessee Valley Authority v. Mason Coal, Inc., 384 F. Supp. at 1111 ("The courts have stated that the advertisement, bid, and acceptance constitute the real contract."); North American Iron & Steel Co. v. United States, 130 F. Supp. at 724 (providing that a binding contract is created when the government accepts a private party's bid).

<sup>35</sup> United States v. Purcell Envelope Co., 249 U.S. at 319; Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States, 229 Ct. Cl. 434 (1982); *see also* Dale Construction Co. v. United States, 168 Ct. Cl. 692 (1964).

advertisement, bids for furnishing stamped envelopes and newspaper wrappers.<sup>36</sup> In response to the government's offer, the Purcell Envelope Company submitted a bid in the manner and time specified in the advertisements.<sup>37</sup> The Company's bid was accepted, but later the government refused to perform under the contract.<sup>38</sup> In the resulting lawsuit, the government defended on the ground that there was no formal contract between the parties.<sup>39</sup> The U.S. Supreme Court found for the Purcell Envelope Company, holding that a contract resulted from the offer and acceptance of the bid and that the subsequent signing of a written contract was not required.<sup>40</sup> When the Commission accepted Univision's high bid of \$18,798,000.00, published a Public Notice announcing Univision as the winning bidder for Channel 52 in Blanco, and demanded and accepted a 20% downpayment for the authorization, a contract was created. To argue otherwise would eviscerate the Commission's auction authority.

Consistent with the provisions of 28 U.S.C. Section 1491, established by the Tucker Act, the United States Court of Federal Claims has jurisdiction to render judgement for damages on any claim concerning, *inter alia*, the breach of an implied or express contract against the United States government.<sup>41</sup> Accordingly, should the Commission fail to grant Univision's application as amended, in addition to any other administrative or judicial remedies available, Univision would be entitled to pursue contract damages for the breach created by the Order.

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<sup>36</sup> United States v. Purcell Envelope Co., 249 U.S. at 315.

<sup>37</sup> Id.

<sup>38</sup> Id. at 316.

<sup>39</sup> Id.

<sup>40</sup> Id. at 319.

<sup>41</sup> 28 U.S.C. § 1491.



**VII. The Commission's Refusal to Grant Univision's Authorization for NTSC Service on Channel 52 at Blanco Constitutes an Unconstitutional Taking in Violation of the Fifth Amendment**

The Commission's decision to prohibit analog television service on Channel 52 in Blanco violates the Takings Clause of the Fifth Amendment, which prohibits government from taking private property "without just compensation." U.S. CONST. Amend. V. As demonstrated above, Univision and the Commission entered into a legally binding contract for the sale of the authorization to provide NTSC service on Channel 52 in Blanco. It is well-settled that contractual rights are property rights and that the appropriation or destruction of such rights can rise to the level of an illegal taking by the government.<sup>42</sup>

In an effort to modify the contract between Univision and the Commission, the Order requires Univision to locate a new channel or operate only as a digital facility. As discussed above, Univision has worked tirelessly to locate an alternate channel in an effort to comply with the Order. However, should the Commission decline to adopt that channel allotment or to grant an application on that channel at least comparable to Univision's Channel 52 application, the Order would prevent Univision from utilizing the authorization for which it has bargained, and instead limit the Channel 52 allocation to use solely for digital television broadcasting. Limiting the use of Channel 52 to DTV broadcasting eliminates most of the value for which Univision contracted, as data from Nielsen, taken from its sample of television households in the Austin DMA, continues to indicate that there is not a single DTV set in the entire Austin DMA, much

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<sup>42</sup> See, e.g., Lynch v. United States, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States."); Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924) (holding that the government had expropriated plaintiff's contract rights and was therefore required to pay compensation.); see also Connolly v. Pension Benefits Guar. Corp., 475 U.S. 211 (1985) (recognizing that contract rights can create property rights).

less in Blanco. Even if Nielsen's sample data inaccurately reflects DTV set penetration in the market, and there actually are a few DTV sets in the market, advertisers will not pay to reach zero viewers, which is what Nielsen data indicates to advertisers a Channel 52 DTV operation at Blanco would reach. In contrast, there are approximately 1,000,000 analog television sets in the market, making an analog television station vastly more economically viable than a stand alone DTV facility. As a result, limiting the Channel 52 allotment to use only for digital television broadcasting almost entirely eliminates the value of the Channel 52 allotment for which Univision bid.

The Order's imposition of a DTV-only requirement therefore results in a taking because it deprives Univision of economically viable use of the station for which it has contracted.<sup>43</sup> When a regulation results in the elimination of economically viable uses of property, it is a taking and is "compensable without case specific inquiry into the public interest advanced."<sup>44</sup> Here, the Order would render the Blanco Channel 52 authorization economically useless at the moment, with greatly reduced value until all analog television sets have been replaced with DTV sets. Under these circumstances, no further inquiry is necessary to determine that the Commission's decision has resulted in an unconstitutional taking.<sup>45</sup>

The Commission's decision is also a taking under the three part test established by the U.S. Supreme Court in *Penn Central Transportation. Co. v. New York City*, 438 U.S. 104 (1978). As set forth in that case, to determine whether there is a taking, courts examine: (1) the character

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<sup>43</sup> See Lucas v. South Carolina, 505 U.S. 1003 (1992).

<sup>44</sup> Id. at 1015.

<sup>45</sup> See, e.g., Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 295-96 (1981) (stating that "[a] statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use" of his property) (citation omitted).

of the governmental action, (2) “the economic impact of the regulation,” and (3) “the extent to which the regulation has interfered with distinct investment-backed expectations.”<sup>46</sup> The character of the governmental action here is of a highly serious nature because it is a complete appropriation, nullifying entirely the contracted-for use of Channel 52 at Blanco – analog broadcasting. The Supreme Court has stated that when a governmental action destroys “one of the most essential sticks in the bundle of rights that are commonly characterized as property,” the first factor in the *Penn Central* test weighs heavily toward finding a taking.<sup>47</sup>

Regarding the second factor, as noted above, the economic impact of the regulation in this case is the loss of any economically viable use by Univision of Channel 52 in Blanco for many years to come. The Supreme Court has long held that where a regulation greatly reduces the value of property, a taking has occurred.<sup>48</sup> The Court has even found takings in cases where the economic impact was relatively small.<sup>49</sup> In this case, the impact is substantial, as indicated by the fact that hardly any station in the country is operating as a DTV-only facility. Therefore, there can be no doubt that the economic impact of the Order is sufficiently drastic to satisfy the economic impact prong of the *Penn Central* test.

The third factor is a “way of limiting taking recoveries to owners who could demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime.”<sup>50</sup> Here, there is no question that Univision participated in the auction and

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<sup>46</sup> Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

<sup>47</sup> Hodel v. Irving, 481 U.S. 704, 716 (1987) (quoting Kaiser Aetna, 444 U.S. at 176).

<sup>48</sup> Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

<sup>49</sup> See Hodel v. Irving, 481 U.S. 704 (1987).

<sup>50</sup> Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (D.C. Cir. 1994).

established the amount of its bid for Channel 52 in reliance on investment-backed expectations. Univision has committed to pay \$18,798,000.00 and has already submitted a downpayment of \$3,759,600.00 to the U.S. Treasury. By prohibiting Univision from building an analog facility in Blanco that can be converted to DTV when DTV set penetration makes such a move economically practical, the Commission has impaired Univision's reasonable investment-backed expectations. Therefore, all three of the *Penn Central* factors are satisfied and the Order creates a taking under the Fifth Amendment with regard to Univision's contracted-for acquisition of the Blanco analog authorization.

The Supreme Court has recently held that a Fifth Amendment takings claim exists even when title is transferred after the enactment of the regulation and the new owner had notice of the regulation at the time of transfer.<sup>51</sup> As a result, Univision retains the ability to challenge the FCC's actions in this case even if it were claimed that Univision somehow had "notice" that the Commission might change its policies. According to the Court, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."<sup>52</sup> Univision participated in an auction initiated by the Commission in which Univision was the successful bidder for a construction permit on NTSC Channel 52 at Blanco. The Commission required Univision to submit a substantial downpayment on the authorization at the conclusion of the auction. For the Commission to now ignore the existence of the contract it entered into with Univision -- a contract that complied with all then-existing FCC regulations -- would be

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<sup>51</sup> Palazzolo v. Rhode Island, 121 S.Ct. 2448 (2001).

<sup>52</sup> Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994).


fundamentally unfair. The Takings Clause of the Fifth Amendment provides the Constitutional protection against such a result in this case.

### **CONCLUSION**

For the reasons stated above, the Commission erred by summarily including Univision's pending application for Channel 52 at Blanco in the category of applicants forced to amend their applications or be dismissed in the face of the reallocation of television channels 52-59. In recognition of the Commission's public interest goals in clearing the Lower 700 MHz spectrum, however, Univision has identified an alternate analog channel for serving Blanco, and is submitting a Petition for Rulemaking seeking to modify the Blanco allotment to specify operation on Channel 17. However, the Order should be modified by the Commission to permit Univision to remain on Channel 52 at Blanco as specified in Auction No. 80 should the Commission decline to grant that rulemaking petition or Univision's associated application.

Respectfully submitted,

**UNIVISION TELEVISION GROUP, INC.**

By: 

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Dated: March 8, 2002

## **CERTIFICATE OF SERVICE**

I, Rhea Lytle, Secretary at Shaw Pittman LLP, do hereby certify that I caused a copy of the foregoing **"PETITION FOR RECONSIDERATION"** to be sent via U.S. Mail this 8<sup>th</sup> day of March, 2002, to the following:

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Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 8-B201  
Washington, D.C. 20554

The Honorable Kathleen Q. Abernathy\*  
Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 8-A204  
Washington, D.C. 20554

The Honorable Michael J. Copps\*  
Commissioner  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Room 8-A302  
Washington, D.C. 20554

The Honorable Kevin J. Martin\*  
Commissioner  
Federal Communications Commission  
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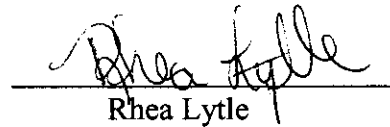
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